ROBERT LEONARD HICKLEY
versus
SHANE ROBERT HICKLEY
and
PETER MAKUNYIRE
and
SMART ESTATE AGENTS

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 20 March 2023

Opposed Application

J. Zviuya, for the applicant
C. Maunga (Jnr), for the 1st respondent
E. Ngwerewe, for the 2nd respondent

MUZENDA J: This is an application for an interdict where applicant seeks the following relief as per his draft.

"*IT IS ORDERED THAT:*

1. *The 2nd and 3rd Respondents be and are hereby interdicted from making payment of the purchase price to the 1st Respondent or to anyone else other than the Applicant pending finalization of the action under Case Number HC 87/2021.*
2. *ALTERNATIVELY and in the event of payment being made to the 3rd Respondent by 2nd Respondent, the 3rd Respondent be and is hereby ordered to hold in trust any portion of the balance of the purchase price paid to it by the 2nd Respondent pending the outcome of Case No. HC 87/2021.*
3. *The 1st and 2nd Respondents shall pay the costs of suit on attorney-client scale*."

The Parties

First respondent is applicant's biological son who is currently based in the United Kingdom. He is the registered title holder of property under Deed of Transfer No. 5604/89 which property was purchased by the second respondent through an Estate Agent, the third respondent. The property was sold not for cash but through instalments and 2nd respondent is still making payments.

Background Facts

Between 19 and 20 June 2020 and at Mutare, first respondent, Shane Robert Hickley represented by Primrose Lydia Masuku by virtue of a power of attorney sold stand numbers 264, 265 and 266 situated in the District of Umtali to second respondent for US$250 000-00.

Clause 2 of the agreement of sale contains the central pith of dispute and is crafted as follows:

> "*2.* <u>*Payment Terms*</u>
> *i)* *Part purchase price of $10 000 to be paid on date of signature; $40 000 to be paid to Robert Leonard Hickley within 21 working days from the date of signature.*
> *ii)* *Balance of $200 000 to be paid in 20 months to Robert Leonard Hickley in instalments of not less than $5 000 per month as of the 31st of August 2020 to the 31st of August 2022*."

Clause 3 of the agreement of sale provides for the payment in United States Dollars.

Applicant strongly contends in his papers that in 1989 after divorcing first respondent's mother, he decided to register the subject property in first respondent's name so as to protect same against chancers in his subsequent marriages. At that material time, first respondent was still a minor, however to applicant he retained sale beneficial rights in the property. It is applicant who decided in 2020 to dispose of the property and informed first respondent. First respondent then gave Primrose Lydia Masuku powers of attorney to sign the agreement of sale on his behalf, hence all along first respondent had been holding the property in trust on behalf of applicant. As a result of this arrangement the proceeds of the agreement of sale were specifically and deliberately divested to the applicant in terms of clause 2 of the agreement of sale. Applicant adds that he received part of the payment.

Later in August 2020, third respondent wrote to applicant informing him that the agreement of sale had been amended by the parties and that the balance had been withheld because of the misunderstanding between applicant and first respondent and that all future disbursements would be channelled to Primrose Lydia Masuku of T. Pfigo Legal Practitioners in Harare. Applicant was aggrieved by these developments and proceeded to issue summons against the respondents. He then initiated this application praying for a provisional order spelt out at the outset of this judgment.

First respondent in his opposing papers challenged applicant's *locus standi* on the basis that applicant is not a party to the agreement of sale as such has no legal basis upon which he seeks enforcement of the terms of the agreement. He adds that applicant is not the owner of the property sold and that he renounced all rights over the immovable property upon transfer. In addition, first respondent aver that applicant was duly advised of the *addendum* to the principal agreement of sale when first respondent nominated Primrose Lydia Masuku to receive all outstanding payments from the purchaser.

On merits, first respondent denies that applicant is the beneficial owner of the immovable property. First respondent further alleges that the initial clause 2 of the agreement of sale was drafted by third respondent on the instructions of the applicant without first respondent's knowledge. First respondent believes applicant must reimburse him US$50 000-00 already paid to applicant. First respondent denies divesting proceeds to applicant and the money paid to applicant was earmarked for transfer fees, estate agents and payment of utility bills, first respondent also contends that applicant has failed to meet the requirements of an interdict for he failed to prove that he has a clear or *prima facie* right and prays for the dismissal of the application with punitive costs.

Second respondent's opposing papers are almost identical to those of first respondent. Second respondent raises identical preliminary points to those raised by first respondent, that is of *locus standi*, that applicant is not a party to the agreement of sale and cannot be heard to call for adherence to the agreement of sale. He adds that applicant was appraised of the addendum to the agreement appointing Primrose Lydia Masuku to receive the balance outstanding and that applicant's legal practitioners acknowledged receipt of the correspondences.

On merits, second respondent is of the view that applicant has failed to meet the requirements of an interdict. Second respondent admits in his affidavit that applicant donated the stands to first respondent thereby renouncing all rights and title in them. Second respondent denies that applicant is the beneficial owner of the said properties. However, second respondent is not privy to the arrangements between applicant and first respondent that led to the contents of clause 2 to the agreement of sale. Second respondent confirms the existence of the *addendum* and also concedes that the instalments are no longer done through the applicant. He also confirms that first respondent is now based in the United Kingdom and has since appointed a third party to receive payments on his behalf but the decision to nominate applicant as recipient was made for convenience purposes. On all other issues, as already pointed out, second respondent seems to repeat what first respondent averred in his opposing affidavit. Second respondent prays equally for the dismissal of applicant's case with punitive costs.

Points *in limine*

Although first and second respondents raised preliminary points in their opposing affidavit, it appears first respondent did not file any heads of argument pursuing them. It is only second respondent who insists on points *in limine* in his heads. Second respondent contends that applicant no longer owns the 3 stands sold to second respondent, applicant was not party

to the agreement of sale and cannot seek any relief associated with it. In principle, applicant has no business in the whole arrangement.

Per contra, applicant believes that he has the requisite *locus standi*, in addition he has a legal interest in the matter in that both first and second respondents are in breach of clause 2 to the original agreement of sale. Applicant stands to suffer irreparable harm. Applicant prays that the preliminary points be dismissed for lack of merit.

The law on locus *standi in judicio* is well traversed by this court as well as superior courts. A litigant must satisfy the following:

(i) it must establish a direct interest,

(ii) the interest must be substantial

(iii) the interest must pertain to the subject matter and outcome of the matter/litigation[1] *and it is trite that locus standi is the capacity of a party to bring a matter before a court of law and a party must show a direct and substantial interest in the matter.*[2]

Applicant painstakingly explained the history of how he acquired the property, the circumstances under which he registered them in first respondent's names, the process of looking for a purchaser of the property and the whole reason why his name appears in clause 2 of the original agreement of sale. First respondent seems to agree with applicant on all those aspects but contends that applicant relinquished virtually everything on the day of transfer. That is the only contentious issue to be resolved by the trial court, whether the applicant did so or that first respondent held the 3 stands in trust on behalf of the applicant?

What is of crucial importance in this application at this stage is whether applicant has managed to establish fertile ground for *locus standi*? First respondent dilly-dallies as to why applicant's name appears in clause 2 of the agreement. His representative Primrose Masuku's name appears on the agreement of sale, yet on the first date, he did not nominate her to receive the sale proceeds. On the other occasion, first respondent alleges fraud that applicant sort of coerced the drafters of the agreement of sale to put his name without first respondent's approval. How would then Primrose Lydia Masuku proceed to sign the agreement of sale in such a situation? The preponderance of probabilities are that first respondent acceded to the registration of applicant's name in clause 2 of the agreement of sale and later decided to remove it without prior warning to the applicant. I am satisfied that applicant has the requisite *locus*

[1] Dzingirai v Hwende & 114 Ors HH 468/19, Drum City (Private) Limited v Garidzo SC 57/18
[2] Per GWAUNZA DCJ in the case of Drum City supra

standi to bring the application for an interdict. The preliminary point raised by both first and second respondents has no merit. It is dismissed.

The Law on Interdict

Both counsel extensively covered the law on the legal requirements of an interdict and unanimously agree that an applicant must demonstrate in his affidavit a clear right (or *prima facie* right though open to some doubt). Where a clear right is established the applicant does not need to establish a well-grounded apprehension of irreparable harm. However where only a *prima facie* right is established, the second requirement must be established, namely that there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and the balance of convenience favours the granting of interim relief, and the applicant has no other satisfactory remedy. [3] An applicant must show a *prima facie* right having been infringed, or about to be infringed, even if it be open to doubt, an apprehension of an irreparable harm if the interdict is not granted, a balance of convenience favouring the granting of the interdict, the prospects of success on the merits and the absence of any other satisfactory remedy.

These legal requirements are well charted and are to me common cause. I did not hear either of the parties submitting anything to the contrary.

Applying law to the facts

Most facts are to me undisputed by the parties. Applicant donated the immovables to his son, first respondent and the same properties have since been sold to second respondent. A part payment of US$50 000-00 was paid to the applicant with the full knowledge of all the respondents. First respondent is now resident in the United Kingdom and acts through an agent resident in Zimbabwe. First respondent and second respondent have since amended the original agreement of sale, more particularly clause 2, removing the applicant as the targeted recipient of the purchase price. Applicant has since caused summons to be issued in this court to "*redress*" the steps taken by the respondents and in the meantime had approached this court seeking an interim interdict forestalling the payment of the purchase price to his son, first respondent, else, he will not be able to get anything from the purchaser.

Applicant chronicled the facts preceding this application as well amplified in his pleadings filed in his affidavits. He explains lucidly the reason why his name ended up being included in clause 2 of the principal agreement of sale between his son and the purchaser. To

[3] Mutsahuni & Anor v Minister of Lands, Agriculture, Fisheries, Water and Rural Resettlement and Anor HH 467-21

the applicant, the whole idea of disposing of the property was initiated by him and the proceeds are destined to be received by him and not his son. To authenticate his expectations, he had since received a part payment from the purchaser and he is expecting the balance. When he did not receive the instalments due he brought action against all respondents. He denies that he fraudulently withheld the US$50 000-00 and that the property sold should benefit his son. Applicant is not praying for a *declaratur* about the money outstanding from the purchaser, no, what he seeks to get from this court is an order forestalling release of the sale proceeds to his son by the purchaser until the civil action lender Case Number HC 87/21 is finalised.

I am of the firm view that applicant's request given the circumstances set out in the papers before me is not unreasonable. First respondents is now based in the United Kingdom and if second respondent releases the balance to first respondent, applicant will suffer irreparable harm. I am satisfied further that applicant has no other alternative remedy than to apply for an interim order. To me there is no prejudice to the respondents, more particularly second respondent.

Applicant had managed to lay grounds for an interim order and he ought to succeed and it is ordered as follows:

1. *The second and third respondents be and are hereby interdicted from making payment to the purchase price to the first respondent or to anyone else pending finalisation of the action under Case number HC 87/2021.*
2. *Alternatively if there are payments already made to third respondent, third respondent be and is hereby ordered to hold such payments in trust until the case under HC 87/2021 is finalized.*
3. *Second respondent to pay applicants costs.*

Bere Brothers, applicant's legal practitioners.
T. Pfigu Attorneys, first respondent's legal practitioners.
Chatsama & Partners, first respondent's legal practitioners.